Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuah, deceased) v Superintendent of Lands & Survey & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(IM)-716 OF 2010
LOW HOP BING, MOHD HISHAMUDIN AND ABDUL WAHAB PATAIL JJCA
20 APRIL 2012

Land Law — Customary land — Alienation — Native customary rights ('NCR') land — Alienation without extinguishing NCR of deceased and without payment of compensation to estate or beneficiaries — Contravention of s 15 of the Sarawak Land Code ('Code') — Subdivided lands unlawfully infringed — Losses and damage to estate and/or administrator — Whether estate's administrator's rights over land claimed lost by alienation — Whether claim for damages barred by s 202 of the Code — Sarawak Land Code (Cap 81) ss 15 & 202

The present appeal stemmed from the High Court's decision in allowing the respondents' ('the defendants') application under O 33 r 2 of the Rules of the High Court 1980 ('RHC') to determine a preliminary issue of law based on limitation, and in striking out the appellant's ('the plaintiff') action. Sometime in early 1981, the deceased applied to the first defendant for alienation of the native customary rights ('NCR') land but the application was refused. The alienation of the said subdivided lots was effected without extinguishing the NCR of the said deceased and/or of the beneficiaries and without payment of compensation to the estate or to the beneficiaries of the estate. In the premises, the said alienation contravened s 15 of the Sarawak Land Code ('SLC'). As a result, the NCR of the deceased over the said land and/or the said subdivided lots were unlawfully infringed and the estate of the deceased and/or the beneficiaries suffered loss and damage. The plaintiff, the administrator of the estate, had sought in the High Court for a declaration that the parcel of land, containing an area of about 8.51 acres situated at Miri forming part of Lots 1314, 1315 and 1351 to 1362 was the NCR land ('the land') of the deceased; upon the death of the deceased, the land formed part of the estate of the deceased and devolved upon the plaintiff and his siblings as beneficiaries; that the alienation of the land to Sarawak Economic Development Corporation ('SEDC') contravened s 15 of the Sarawak Land Code ('SLC'); and that the said alienation constituted wrongful infringement of the NCR of the deceased and/or the estate and/or the beneficiaries, or extinguishment of the NCR of the deceased; and his estate was entitled to compensation. The defendants applied for striking out of the plaintiff's case and the application was allowed. The issues that arose in the present appeal were whether the plaintiff's claim for

declarations ought to be granted by the court as the plaintiff's right (if any) over the land claimed were lost by the alienation to SEDC, and this action was commenced in April 1996; and whether the plaintiff's claim for damages was barred by s 202 of the Code.

Held, dismissing the appeal and affirming the decision of court below with agreed costs of RM5,000:

(1) It was appropriate to dispose of the plaintiff's action under O 33 r 2 of the RHC. The learned judge was correct in sustaining the defendants' limitation plea and in determining it as a preliminary issue, thereby striking out the plaintiff's action (see para 24).

(2) The word 'aforesaid' in s 202 of the SLC requires that the said provision be read conjunctively with the preceding provisions, more specifically ss 197, 200 and 201 which provide for the recovery of damages or compensation by any person who is deprived of his land. Since the plaintiff's action and pleaded case sought to recover damages or compensation on the ground that the deceased or the deceased's estate was deprived of the land, s 202 of the SLC clearly applied (see para 17).

(3) It is trite law that when the plea of limitation was raised for the defendants, the plaintiff bore the burden of proving that his action was brought within the prescribed limitation period. Section 202 of the SLC prescribes a time bar of three years. It came into force on 1 January 1958 as a special law on limitation governing an action of the nature expressly stipulated such as the plaintiff's action. Although a statute of limitation was subsequently enacted, s 5 of the Sarawak Limitation Ordinance which came into force on 1 January 1959, specifically provides that the limitation period prescribed in s 202 was not affected by the provisions of the Sarawak Limitation Ordinance. Hence, s 202 of the SLC governed the plaintiff's action (see para 18).

(4) While it was true that the plaintiff prayed for various declarations, the declarations were apparently weak in the sense that they lacked enforceability and there can be no committal. Be that as it may, these declarations were nevertheless vehicles employed by the plaintiff to recover damages or compensation read conjunctively with other prayers for recovery of damages. It was abundantly clear that these prayers for recovery of damages came within the provisions of s 202 of the Code (see para 19).

[Bahasa Malaysia summary

Rayuan ini bermula daripada keputusan Mahkamah Tinggi yang membenarkan permohonan responden-responden ('defendan-defendan') di bawah A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menentukan isu undang-undang awalan berdasarkan had masa, dan

pembatalan tindakan perayu ('plaintif'). Sekitar awal 1981, si mati telah memohon kepada defendan pertama untuk pemberian milik tanah hak-hak adat anak negeri ('HAAN') tetapi permohonan tersebut ditolak. Pemberian milik lot-lot yang telah dipecah bahagi diberi efek tanpa melupuskan HAAN si mati dan/atau waris-waris dan tanpa pembayaran ganti rugi kepada estet atau kepada waris-waris estet. Dalam premis ini, pemberian milik tersebut bercanggah dengan s 15 Kanun Tanah Sarawak ('KTS'). Akibatnya, HAAN si mati ke atas tanah tersebut dan/atau lot-lot yang dipecah bahagi adalah menyalahi undang-undang dan estet si mati dan/atau waris-warisnya telah mengalami kehilangan dan kerugian. Plaintif, pentadbir estet tersebut telah memohon di Mahkamah Tinggi untuk deklarasi bahawa bidang tanah, yang meliputi kawasan sekitar 8.51 ekar yang terletak di Miri yang membentuk sebahagian daripada Lot 1314, 1315 dan 1351 hingga 1362 adalah tanah HAAN si mati ('tanah tersebut'); setelah kematian si mati, tanah tersebut membentuk sebahagian daripada estet si mati dan diturunkan kepada plaintif dan adik-beradiknya sebagai waris; bahawa pemberian milik tanah kepada Sarawak Economic Development Corporation ('SEDC') bercanggah dengan s 15 Kanun Tanah Sarawak ('KTS'); dan bahawa pemberian milik membentuk pelanggaran yang salah HAAN si mati dan/atau estet dan/atau waris-waris, atau penghapusan HAAN si mati; dan estetnya adalah berhak untuk pampasan. Defendan-defendan memohon untuk pembatalan kes plaintif dan permohonan telah dibenarkan. Isu-isu yang timbul dalam rayuan ini adalah sama ada tuntutan plaintif untuk deklarasi-deklarasi seharusnya dibenarkan oleh mahkamah memandangkan hak plaintif (sekiranya ada) terhadap tanah yang dituntut telah hilang disebabkan pemberian milik kepada SEDC, dan tindakan ini telah bermula pada April 1996; dan sama ada tuntutan plaintif untuk pampasan dihalang oleh s 202 KTS.

Diputuskan, menolak rayuan dan mengesahkan keputusan mahkamah bawahan dengan kos dipersetujui RM5,000:

(1) Adalah berpatutan untuk melupuskan tindakan plaintif di bawah A 33 k 2 KMT. Hakim yang bijakasana adalah betul dalam mengekalkan rayuan had masa defendan-defendan dan dalam menentukan ia sebagai isu awalan, justeru membatalkan tindakan plaintif (lihat perenggan 24).

(2) Perkataan 'aforesaid' di dalam s 202 KTS memerlukan peruntukan tersebut untuk dibaca secara bersama-sama dengan peruntukan sebelumnya, dengan lebih spesifik ss 197, 200 dan 201 yang mana memperuntukkan untuk mendapatkan semula ganti rugi atau pampasan oleh sesiapa yang dinafikan tanahnya. Memandangkan tindakan plaintif dan kes yang dirayu bertujuan untuk mendapatkan semula ganti rugi atau pampasan atas dasar bahawa si mati atau estet si mati telah dinafikan tanah tersebut, s 202 KTS dengan jelas diguna pakai (lihat perenggan 17).

(3) Adalah undang-undang nyata apabila rayuan had masa telah dibangkitkan untuk defendan-defendan, plaintif menanggung beban untuk membuktikan bahawa tindakannya telah dibuat dalam tempoh had masa yang ditetapkan. Seksyen 202 KTS menetapkan had masa selama tiga tahun. Ia berkuat kuasa pada 1 Januari 1958 sebagai undang-undang istimewa tentang had masa berkenaan dengan tindakan yang mana sifatnya dengan jelas diperuntukkan seperti tindakan plaintif. Meskipun statut had masa kemudiannya digubal, s 5 Ordinan Had Masa Sarawak yang mana berkuat kuasa pada 1 Januari 1959, dengan spesifik memperuntukkan bahawa tempoh pembatasan yang ditetapkan di dalam s 202 tidak terjejas oleh peruntukan-peruntukan Ordinan Had Masa Sarawak. Justeru, s 202 KTS merangkumi tindakan plaintif (lihat perenggan 18).

(4) Meskipun adalah benar bahawa plaintif memohon untuk pelbagai deklarasi, deklarasi-deklarasi tersebut adalah lemah dalam erti kata bahawa ianya kurang dari segi penguatkuasaan dan tidak mungkin terdapat pengkomitan. Meskipun sedemikian, deklarasi-deklarasi tersebut merupakan medium yang digunakan oleh plaintif untuk mendapatkan semula ganti rugi atau pampasan yang dibaca bersama-sama dengan permohonan yang lain untuk mendapatkan ganti rugi. Adalah sangat jelas bahawa permohonan-permohonan untuk mendapatkan ganti rugi tertakluk dalam peruntukan s 202 KTS (lihat perenggan 19).]

Cases referred to

BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821; [2009] 4 CLJ 599, CA (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 1 CLJ (Rep) 69, SC (refd)

Dato' Abu Hasan bin Sarif v Dato' Dr Abd Isa bin Ismail [2012] 2 MLJ 429; [2012] 1 MLRA 565, FC (refd)

Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors [2003] 1 MLJ 149, HC (refd)

Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504, HC (refd)

Premium Vegetable Oils Sdn Bhd v ICG Systems Sdn Bhd & Ors [2006] 7 MLJ 39, HC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141; [2010] 1 CLJ 429, FC (refd)

Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors [2002] 5 MLJ 654, HC (refd)

WTK Holdings Bhd v Foo Sae Heng & Anor [2011] 5 CLJ 433, CA (refd)

Legislation referred to

Limitation Ordinance (Sarawak) (Cap 49) s 5
Rules of the High Court 1980 O 33 r 2
Sarawak Land Code (Cap 81) ss 15, 197, 200, 201, 202

Appeal from: Suit No 22–16 of 1996 (MR) (High Court, Miri)

Mekanda Singh Sandhu (Satinder Singh with him) (Sandhu & Co) for the appellant.
JC Fong (Saferi bin Ali with him) (State Attorney, State Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal by the plaintiff was lodged against the decision of the High Court at Miri in allowing the defendant's application under O 33 r 2 of the Rules of the High Court 1980 ('RHC') to determine a preliminary issue of law based on limitation, and in striking out the plaintiff's action.

FACTUAL BACKGROUND

[2] The plaintiff is the administrator of the estate of Mok bin Tuah ('the deceased'). He sought a declaration that:

(a) at all material times, that parcel of land, containing an area of about 8.51 acres situated at Miri River, Miri forming part of Lots 1314, 1315 and 1351 to 1362, Block 3 Miri Concession Land District, was the native customary rights land ('the land') of the deceased;

(b) upon the death of the deceased, the land formed part of the estate of the deceased and devolved upon the plaintiff and his siblings as beneficiaries thereof;

(c) the alienation of the land to Sarawak Economic Development Corporation ('SEDC') contravened s 15 of the Sarawak Land Code (Cap 81) (1958 Ed); and

(d) the said alienation constituted:

(i) wrongful infringement of the native customary rights ('NCR') of the deceased and/or the estate thereof and/or beneficiaries thereof, or

(ii) extinguishment of the NCR of the deceased and his estate is entitled to compensation.

(A reference hereinafter to a section is a reference to that section in the Sarawak Land Code unless otherwise stated).

[3] The plaintiff prayed for damages, costs and other reliefs as the court thinks fit and just.

[4] Paragraphs 5 and 8–9 of the plaintiff's amended statement of claim are relevant to this appeal. They merit reproduction as follows:

> 5. Sometime in early 1981, the said deceased applied to the 1st Defendant for alienation of the said NCR land. However, the 1st Defendant refused the said application.
>
> 8. The alienation of the said subdivided lots was effected without extinguishment of the native customary rights of the said deceased and/or of the beneficiaries thereof and without payment of compensation to the estate or to the beneficiaries of the estate. In the premises the said alienation contravened section 15 of Land Code (Cap 81).
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> 9. By reasons of the matters aforesaid, the native customary rights of the said deceased over the said land and/or the said subdivided lots were unlawfully infringed and the estate of the deceased and/or the beneficiaries thereof have thereby suffered loss and damage and continues to suffer loss and damage.

[5] Vide summons in chambers, the defendants sought determination on two preliminary issues of law viz:

(a) whether having regard to the fact that the plaintiff's right (if any) over the land claimed herein were lost by the alienation thereof to SEDC on 21 December 1987, and this action was commenced in April 1996, the plaintiff's claim herein for declarations (a discretionary remedy) ought to be granted by the court? and

(b) whether the plaintiff's claim for damages is barred by virtue of s 202 of the Land Code?

[6] The High Court allowed the defendants' summons in chambers, answered preliminary issue (b) in the affirmative and struck out the plaintiff's action.

[7] Hence, this appeal by the plaintiff.

ORDER 33 RULE 2

[8] For the purposes of considering the defendants' application under O 33 r 2, paras 5 and 8–9 of the plaintiff's statement of claim are assumed to have been proved by the plaintiff.

[9] Order 33 r 2 confers on the court the power to deal with any question or issue of fact or law. It provides as follows:

> 2 The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[10] Under O 33 r 2, it is appropriate to consider a preliminary issue of fact or law or partly of fact and partly of law for the purpose of bringing about a disposal of the whole suit, thereby dispensing with the necessity of a trial of the action. It is eminently suitable to invoke O 33 r 2 if:

(a) the determination of the issue will result in a substantial saving of time and costs which otherwise would have to be expended should the action as a whole proceed to a full trial;

(b) there is no substantial dispute of facts; and

(c) a decision on the preliminary issue would result or substantially result in the disposal of the whole case.

See:

(a) *Premium Vegetable Oils Sdn Bhd v ICG Systems Sdn Bhd & Ors* [2006] 7 MLJ 39 (HC) per Ramly Ali J (now JCA);

(b) *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149, Abdul Malik Ishak J (now JCA);

(c) *Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors* [2002] 5 MLJ 654, Arifin Zakaria J (now CJ Malaysia); and

(d) *Malaysian Court Practice (High Court Practice 1)* 2011 Desk Ed pp 586–587.

[11] Having set out the aforesaid principles under O 33 r 2, we shall now

consider the preliminary issue based on limitation.

LIMITATION UNDER S 202

[12] The plaintiff's cause of action is based on infringement of NCR over the land as a result of the defendants' refusal to alienate the land to the deceased in 1981 and the subsequent alienation of the land to SEDC on 21 December 1987, thereby depriving the deceased or his estate of the land or NCR over it, and causing loss and damage to the plaintiff who is now making a claim therefor.

[13] Learned State Legal Counsel Datuk JC Fong (assisted by Mr Saferi bin Ali) raised the issue of limitation and contended that the plaintiff's claim filed in April 1996 was barred by s 202.

[14] The plaintiff's learned counsel Mr Mekanda Singh Sandhu (Mr Satinder Singh with him) argued that s 202 is inapplicable as the plaintiff had included prayers for declarations.

[15] The question for determination in this appeal revolves around the construction of s 202, particularly the three-year limitation period prescribed therein.

[16] Section 202 reads:

> Limitation of actions
>
> 202 No action for recovery of damages as *aforesaid* shall lie or be sustained against the Government unless the action is commenced within a period of three years from the date when the cause of action accrued:
>
> Provided that any person under the disability of infancy or unsoundness of mind may bring such an action within three years from the date upon which the disability ceased. (Emphasis added.)

[17] In our view, the word 'aforesaid' in s 202 requires that s 202 be read conjunctively with the preceding sections, more specifically ss 197 and 200–201 which provide for the recovery of damages or compensation by any person who is deprived of his land. Since the plaintiff's action and pleaded case sought to recover damages or compensation on the ground that the deceased or the deceased's estate was deprived of the land, s 202 clearly applies.

[18] Section 202 prescribes a time bar of three years. It came into force on 1 January 1958 as a special law on limitation governing an action of the nature expressly stipulated therein such as the plaintiff's action. Although a statute of

limitation was subsequently enacted, s 5 of the Limitation Ordinance (Sarawak) (Cap 49) (which came into force on 1 January 1959) specifically provides that the limitation period prescribed in s 202 is not affected by the provisions of the Sarawak Limitation Ordinance. Hence, s 202 continues to govern the plaintiff's action.

[19] While it is true that the plaintiff is praying for various declarations, these declarations are apparently weak in the sense that they lack enforceability and there can be no committal: *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141; [2010] 1 CLJ 429 (FC) per Gopal Sri Ram FCJ (as he then was), and *Dato' Abu Hasan bin Sarif v Dato' Dr Abd Isa bin Ismail* [2012] 2 MLJ 429 at p 438; [2012] 1 MLRA 565 at p 571 (FC) per Zulkefli Makinudin CJ (M). Be that as it may, these declarations are nevertheless vehicles employed by the plaintiff to recover damages or compensation, as has been clearly pleaded in paras 5 and 8–9 of the amended statement of claim alluded to above, read conjunctively with other prayers for recovery of damages. That being the case, it is abundantly clear to us that these prayers for recovery of damages come within the provisions of s 202.

[20] It is trite law that when the plea of limitation was raised for the defendants, the plaintiff bears the burden of proving that his action was brought within the prescribed limitation period: *WTK Holdings Bhd v Foo Sae Heng & Anor* [2011] 5 CLJ 433 at p 437 per Abdul Wahab Patail JCA, applying *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504 (HC) per Steve Shim Lip Kiong J (later CJ (Sabah and Sarawak); and *BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 MLJ 821 at pp 830–831; [2009] 4 CLJ 599 at pp 608–609 (CA) per Sulaiman Daud JCA.

[21] In respect of the plaintiff's burden of proof, we note that the plaintiff has not filed any reply to defence. In para 8 of the defence, the defendants had specifically pleaded limitation under s 202. In the circumstances, the plaintiff has not discharged the onus of either pleading or proving that his action was brought within the prescribed limitation period.

[22] On the facts, the plaintiff's cause of action had accrued either in 1981, when the deceased's application for the land was refused or rejected; or on 21 December 1987, when the plaintiff alleged that the alienation of the land to SEDC without extinguishment of the NCR of the deceased or the deceased's estate and without payment of compensation was in contravention of s 15. Notwithstanding the aforesaid accrual of the plaintiff's cause of action, he commenced his action in the High Court in April 1996, some 15 years from

1981 or alternatively nine years from 1987. In either event, the commencement of the action by the plaintiff was well beyond the three-year time bar prescribed in s 202.

[23] The *raison d'etre* for the doctrine of limitation has been succinctly stated in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at pp 413–414; [1991] 1 CLJ (Rep) 69 at p 76 (FC) by Hashim Yeop Sani CJ (Malaya) as follows:.

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
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> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the State there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

CONCLUSION

[24] On the foregoing grounds, we hold that it is appropriate to dispose off the plaintiff's action under O 33 r 2. The learned judge was correct in sustaining the defendants' limitation plea and in determining it as a preliminary issue, thereby striking out the plaintiff's action.

[25] We therefore dismiss this appeal which is devoid of merits and affirm the decision of the High Court, with agreed costs of RM5,000. Deposit to the defendants (the respondents) on account of the agreed costs.

Appeal dismissed and decision of court below affirmed with agreed costs of RM5,000.

Reported by Afiq Mohamad Noor